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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1314

SOUTHERN PACIFIC COMPANY,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Southern Pacific Company, a corporation, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered on January 6, 1947, and order overruling plaintiff's motion for new trial entered on March 3, 1947, in the above entitled case, No. 46236, in the Court of Claims.

Summary Statement of the Case

In 1942 and 1943, petitioner, a common carrier by railroad, performed transportation service for the United States by carrying foodstuffs and supplies procured and shipped by the War Relocation Authority[1] to relocation

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[1] An agency created by Executive Order No. 9102, March 18, 1942, as a part of the Office for Emergency Management in the Executive Office of the President. 7 F. R. 2165.

centers, for use by Japanese civilian evacuees from military areas on the Pacific coast. The foodstuffs and supplies included in these shipments are described in Finding 15 (R. 60). They included foodstuffs of all kinds, tools and building material, household equipment and furnishings, agricultural equipment and supplies, and other equipment and supplies for civilian community use.

Petitioner billed the transportation charges at the applicable commercial rates. Payment was made by the Government at lower net rates constructed by making land-grant deductions from the applicable commercial rates, *i. e.* at net land-grant rates. Petitioner thereupon brought this action to recover the difference between net land-grant rates as paid, and the full commercial rates claimed.

The Court of Claims (Judge Littleton dissenting) held that the evacuation of the Japanese civilian population from military areas on the Pacific coast having been determined to be a matter of military necessity, the consequent relocation and maintenance of the evacuees at relocation centers, following the evacuation, were equally a matter of military necessity, and that therefore the shipments in question—although handled by a civilian agency of the Government and intended for use by civilians—were shipments of military property moving for military and not for civil use.

Statute Involved

The statute in question in Section 321(a), Title III, Part II, of the Transportation Act of 1940; Act of September 18, 1940, c. 722, 54 Stat. 898; 49 U. S. Code. Sec. 65(a):

> "Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United

States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty: * * *"

Questions Presented

1. Whether the shipments in question—consisting of foodstuffs and articles and supplies procured and shipped by the War Relocation Authority and intended for use by Japanese civilian evacuees at relocation centers administered by the War Relocation Authority—were shipments of military property of the United States moving for military and not for civil use, in the sense of Section 321(a) of the Transportation Act of 1940.

2. Whether the Court of Claims has made adequate and correct findings of fact on the evidence and record before the court, as requested by petitioner.

Specification of Errors

The Court of Claims erred:

1. In holding that the shipments in question were shipments of military property of the United States moving for military and not for civil use, within the meaning of Section 321(a) of the Transportation Act of 1940.

2. In failing to find as a fact (preferably as a part of Finding 9), as requested by petitioner, the following:

> "In his final report (plaintiff's Exhibit No. 1) the Commanding General stated:
>
> 'Essentially, military necessity required only that the Japanese population be removed from the coastal area and dispersed in the interior, where the danger

of action in concert during any attempted enemy raids along the coast, or in advance thereof as preparation for a full scale attack, would be eliminated. That the evacuation program necessarily and ultimately developed into one of complete Federal supervision, was due primarily to the fact that the interior states would not accept an uncontrolled Japanese migration.' "

3. In failing to include in Finding 10, in referring to the agreement between the War Department and the War Relocation Authority, a finding that the agreement recited that the War Relocation Authority was an independent establishment created by Executive Order of the President, so that the third sentence of Finding 10 will read, as requested by petitioner, as follows:

"The agreement, which appears on page 239 of plaintiff's exhibit No. 1 and is made a part hereof by this reference, recited that [the War Relocation Authority is an independent establishment created by Executive Order of the President, No. 9102 dated March 18, 1942, with] the primary objective of relieving the military establishment of the burden of providing for the relocation of persons excluded from military areas by order of any designated military commander and that the emphasis in all War Relocation Authority activities would be increasingly to alleviate the drain on military resources in regard to all phases of evacuation and relocation."

4. In failing to find as a fact in lieu of subparagraph (5) of Finding 10, as requested by petitioner, the following:

"(5) From the date of opening, or the date on which the War Relocation Authority began the operation of any Relocation Center, as the case might be, the War Department would transfer accountability for all such equipment and property to the War Relocation Authority and the Authority would assume accountability for all such equipment and property and would thereafter

maintain and replace all such equipment and property, including subsistence, and would procure whatever additional supplies, subsistence and equipment it might require, with the understanding that the Authority could effect its procurement through War Department agencies, the cost to be charged to Relocation Authority appropriation."

5. In failing to find as a fact (preferably as a part of Finding 11), as requested by petitioner, the following:

> "The Tule Lake relocation center was opened by the War Relocation Authority on May 27, 1942."

6. In failing to make an additional finding, as requested by petitioner, as follows:

> "The War Relocation Authority was created and operated as a civilian agency of the Government to administer the relocation centers established for persons of Japanese ancestry who were evacuated from military areas pursuant to Executive Order No. 9066. Its functions and duties were civilian in character, as distinguished from military."

7. In finding as a fact (Finding 19) that the shipments in question were military property of the United States moving for military and not for civil use, over petitioner's exception that Finding 19 is a conclusion of law and not a finding of fact.

Reasons for Allowance of the Writ

On March 3, 1947, this court decided *United States* v. *Powell et al.*, and *United States* v. *Atlantic Coast Line R. Co.*, Nos. 56 and 57, and *Northern Pacific R. Co.* v. *United States*, No. 400, cases which involved the construction of Section 321(a) of the Transportation Act of 1940.

In the *Powell* case, this court held that Section 321(a) distinguishes "military or naval" use from "civil" use and

must be construed to preserve that distinction, and that the shipments there in question were not shipments of military property for military use. In the *Northern Pacific* case, this court further considered the scope of the exception in favor of military and naval movements and held that the shipments there in question were shipments of military property for military use.

The case here presented involves the application of Section 321 (a) to shipments made by the War Relocation Authority of foodstuffs and supplies for use by Japanese civilian evacuees from military areas who were detained in relocation centers administered by the War Relocation Authority during the period of its activity, from March 18, 1942, when it was created by executive order, until the latter part of 1944. During that period ten relocation centers were established and operated in California, Utah, Arizona, Idaho, Colorado, Wyoming and Arkansas, and a large volume of supplies of all kinds were shipped by railroad and truck to all those centers. On all such movements the Government has claimed land-grant rates on the ground that the shipments were military property moving for military and not for civil use.

Petitioner submits that the decision of the Court of Claims is in conflict with the decision of this court in the *Powell* case, that it is important in the settlement and disposition of similar cases now pending in the Court of Claims and in other courts that the scope of the exception in favor of military and naval movements be clearly defined, and that the writ of certiorari herein prayed should be allowed.

Respectfully submitted,

C. O. Amonette,
Lawrence Cake,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1314

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THE UNITED STATES,
Respondent.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR CERTIORARI

Opinion Below

The opinion of the Court of Claims is reported in —F. Supp. —, and is included in the record herein (R. 62).

Jurisdiction

The judgment of the Court of Claims was entered on January 6, 1947 (R. 66), and motion for new trial was overruled on March 3, 1947. The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 229, 43 Stat. 939, as amended; 28 U. S. Code, Section 288.

Statement of the Case

The case is stated in the petition for certiorari.

Specification of Errors to Be Urged

The Court of Claims erred:

1. In holding that the shipments in question were shipments of military property of the United States moving for military and not for civil use, within the meaning of Section 321(a) of the Transportation Act of 1940.

2. In failing to make adequate and correct findings of fact, as requested by petitioner and based on the evidence and record before the court, as specified in the petition for certiorari.

Outline of the Argument

I. The articles and supplies in question were not military property moving for military use in the sense of the Transportation Act of 1940. On the contrary, they were shipments of civilian supplies for civilian use.

The War Relocation Authority was a civilian agency. It was created by executive order as a part of the Office for Emergency Management in the Executive Office of the President. Its origin, purpose and character are stated in detail in Lt. General DeWitt's Final Report on the Japanese Evacuation from the West Coast in 1942.[2] This report was introduced in evidence and has been certified as an additional part of the record pursuant to Rule 99 (a) of the Court of Claims.

In this report the first three paragraphs of Chapter V, entitled Separation of Jurisdiction over Evacuation and

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[2] A report submitted by Lt. General DeWitt, Commanding General, Western Defense Command, to the Chief of Staff, U. S. Army, and by the latter submitted to the Secretary of War, and printed as a public document, entitled Final Report Japanese Evacuation from the West Coast 1942. (Government Printing Office: Washington: 1943.)

Relocation, pages 50-51, state the initial problem and the solution decided upon, in part as follows:

"When it became finally evident toward the end of February that a complete evacuation of all persons of Japanese ancestry from Military Area No. 1, and ultimately from the California portion of Military Area No. 2, would be ordered, discussions were initiated in Washington as to whether a separate agency should be created to undertake evacuee supervision and relocation after the Army had attained its objective. The primary basis for these discussions was that Army resources should not be expanded in any direction not essential to the military aspects of the successful prosecution of the war. The Attorney General and other representatives of the Justice Department were also concerned with several post-evacuation consideration, particularly those revolving around the civil rights of American-born Japanese. Justice Department Officials therefore urged the establishment of a separate civilian agency to undertake the post-evacuation phases of relocation. The Assistant Secretary of War, the Director of the Bureau of Budget and the Attorney General all participated in the consideration of this problem.

"The desirability of establishing such an operating agency was generally agreed to when the Assistant Secretary of War came to the West Coast for a survey of the situation.

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"Mr. Milton S. Eisenhower, then Assistant to the Secretary of Agriculture, joined the party as he had participated in the Washington discussions concerning the proposed relocation agency. Mr. Eisenhower returned to Washington after having engaged in discussions with the Commanding General, the Assistant Secretary of War and other officials about March 11, 1942. Following his return, Executive Order of the President No. 9102 was published on March 18th.

> Under its terms, War Relocation Authority was established in the Office for Emergency Management in the Executive Office of the President. Mr. Eisenhower was named as its first Director. Broad powers were accorded. Primarily, however, the new agency became responsible for 'the relocation (of evacuees) in appropriate places, providing for their needs in such manner as may be appropriate, and supervising their activities.' Its power, authority and responsibility are clearly expressed in the order."

The history of the War Relocation Authority as shown by its published reports and by a wealth of material in numerous government reports, of which the courts will take judicial notice, shows the essentially civilian character of its work and activities. The program included plans for evacuee employment and for finding and creating suitable work opportunities, in agriculture, in simple manufacturing, and in community services, and plans for education, medical care, community government and other activities. Such activities included day nurseries and schools for children, college extension courses and adult education classes, the publishing of several newspapers, amusements, and other similar activities.

The appropriations for the War Relocation Authority were separate and distinct from the appropriations for the War and Navy Departments, the War Relocation Authority being provided for out of appropriations for the Executive Office of the President. The transportation charges on the shipments in question, for example, to the extent paid, were paid, out of the appropriation for the Executive Office of the President provided by the Act of July 25, 1942, c. 524, 56 Stat. 704, 709, cited as the First Supplemental National Defense Appropriation Act 1943.

2. The shipments in question were of articles and supplies essentially civilian in character *and intended for*

civilian use. This is an unavoidable conclusion from the facts found by the Court of Claims and from the history of the evacuation and relocation of these people of which this Court will take judicial notice.

The articles and supplies in question are described in Finding 15. They included foodstuffs, tools and building material, household equipment and furnishings, agricultural equipment and supplies, and other equipment and supplies for civilian community use.

It would be difficult to describe articles more non-military in character. It does not help the Government's case to say that such articles, if procured and used by the Army and Navy, would be military or naval property. The articles and supplies here in question were not so procured and used, but were exclusively for use by civilians—that is, those people of Japanese racial stock, some of them aliens and some American citizens, who were evacuated from the Pacific Coast in 1942.

The articles and supplies in question were not only for the purpose of feeding and maintaining these people but also to enable them to engage in useful civilian occupations. This objective of the War Relocation Authority is stated in nearly all its reports and publications. For example, in the First Quarterly Report (March 18 to June 30, 1942) it was stated:

> "The tenth of a million people involved in the West Coast evacuation—roughly two-thirds of whom are American citizens—have only one readily distinguishable characteristic in common: Japanese racial stock. In practically every other respect, they are as heterogeneous a group as—for example—the 110,000 residents of the State of Nevada. Occupationally, they run the gamut from learned doctors of philosophy to muscular young men without special training or skills. The group includes doctors, lawyers, and business executives as well as farmers, fishermen, and truck drivers.

> Despite a marked concentration in some occupations (such as agriculture and retail trade) and a subnormal proportion in others (such as engineering), the evacuee population as a whole embraces virtually every major occupational group.
>
> "Effective employment of this sizable reservoir of manpower and talent has been one of the most pressing tasks of the War Relocation Authority. Mass idleness, clearly, would be damaging to evacuee morale, costly to the tax-payer, and inexcusable, in a national period of decreasing manpower and all-out production. Almost since March 18, the Authority has concentrated a major share of its attention on finding and creating suitable work opportunities for the evacuees and on gearing their activities into the war effort of the Nation."

Such work opportunities were in agriculture, simple manufacturing, community consumer enterprises, and community services.

3. The basis for the conclusion reached by the Court of Claims seems to be, as stated in the court's opinion (R. 65-6), that:

> "The primary purpose of excluding the evacuees from designated military areas did not end merely by escorting them from those areas and preventing their return.
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> • • • • • • •
>
> "We think the military effort extended to the relocation centers; that the military arm was not relaxed after the evacuees were relocated, and that the use of civilian agencies to care for these people did not make military necessity something other than what it was from beginning to end."

This is a statement of opinion, we submit, contrary to the opinion of the military commander himself who ordered

the evacuation, Lt. Gen. DeWitt who in his Final Report said:

> "Essentially, military necessity required only that the Japanese population be removed from the coastal area and dispersed in the interior, where the danger of action in concert during any attempted enemy raids along the coast or in advance thereof as preparation for a full scale attack, would be eliminated. That the evacuation program necessarily and ultimately developed into one of complete Federal supervision, was due primarily to the fact that the interior states would not accept an uncontrolled Japanese migration. Although the initial recommendation of February 14, 1942 (appendix to chapter 3, page 33, supra) contemplated the internment of alien Japanese, this was abandoned as a method of operation. Once authority had been granted to set the program in motion, the Commanding General encouraged and facilitated a voluntary exodus with free choice of destination in the interior of persons of Japanese ancestry."

It is true that the establishment of relocation centers and the necessity of feeding and clothing and maintaining these people would not have been necessary if there had been no war and that what the War Relocation Authority was called upon to do was one of the results of our being at war. But the same can be said of practically every civilian activity of the Government during the war. Thousands of civilian employees were added to the Government payroll during the war and many additional civilian agencies were created, such as the Office of Price Administration, the War Production Board, the Office of Defense Transportation, and so on, all because we were at war, but no one has yet contended that the operation of those civilian agencies in time of war made them a part of the military establishment.

As this court said in the *Powell* case,

> "When the resources of a nation are mobilized for war, most of what it does is for a military end—whether

it be rationing, or increased industrial or agricultural production, price control, or the host of other familiar activities. But in common parlance, such activities are civil, not military. It seems to us that Congress marked that distinction when it wrote Section 321 (a)."

II. The Court of Claims failed to make adequate and correct findings of fact, as requested by petitioner.

In support of these specifications of error petitioner has brought up as a part of the record Lt. Gen. De Witt's Final Report on Japanese evacuation from the West Coast 1942, introduced in evidence as plaintiff's Exhibit No. 1. In the court below, all petitioner's requests for findings of fact, as made in exceptions to the report of a commissioner and in petitioner's motion for new trial, were based on that report.

Specification 2. The finding requested by petitioner as a part of Finding 9, and denied by the Court of Claims, is the statement made by the Commanding General of the Western Defense Command that military necessity required only that the Japanese population be removed from the coastal area and dispersed in the interior. This statement of the Commanding General, quoted from the Final Report (Plaintiff's Exhibit No. 1), is a fact to which petitioner is entitled as a part of the factual background.

Specification 3. The amendment of the third sentence of the first paragraph of Finding 10, as requested by petitioner, is for the purpose of including the clause within brackets, to the effect that the agreement between the War Department and the War Relocation Authority recited that the War Relocation Authority was an independent establishment created by Executive Order of the President. The clause omitted is as much a part of the agreement as any other part. In fact, it constitutes the opening clause of the preamble. Its omission from the court's finding of

the purpose of the agreement makes the finding less than a complete and objective statement of fact.

Specification 4. The amendment of sub-paragraph (5) of Finding 10, as requested by petitioner, is for the purpose of making this finding a more accurate statement of the agreement between the War Department and the War Relocation Authority. Final Report (Plaintiff's Exhibit No. 1), pp. 237-247.

Specification 5. The finding requested by petitioner as a part of Finding 11, is simply that the Tule Lake relocation center was opened by the War Relocation Authority on May 27, 1942. Inasmuch as Finding 11 includes a statement that the Manzanar relocation center was transferred to the War Relocation Authority on June 11, 1942, it should also show the date on which the Tule Lake relocation center was opened by the War Relocation Authority.

Specification 6. The additional finding requested by petitioner, and denied by the Court of Claims, to the effect that the War Relocation Authority was created and operated as a civilian agency of the Government and its functions and duties were civilian in character as distinguished from military, is fully supported by Lt. General DeWitt's Final Report and other material of which the court will take judicial notice.

Final Report, pp. 50-51, 327, 532.

> Circular No. 19, Headquarters Western Defense Command and Fourth Army, 17 September 1942 (Final Report cited, pp. 527, 528):
>
> "2. Pursuant to the provisions of Executive Order No. 9102, March 18, 1942, the War Relocation Authority has been established as a *civilian agency* to assist the military in the evacuation of certain persons; * * *"
>
> "5. Relocation centers are operated by *civilian management* under the War Relocation Authority. * * *"

Fourth Interim Report (Findings and Recommendations on Evacuation of Enemy Aliens and Others from Prohibited Military Zones) of Select Committee Investigating National Defense Migration pursuant to H. Res. 113; H. Rept. 2124, 77th Cong., 2nd Ses. (May 1942) p. 17;

"The far-reaching decision to evacuate created a multitude of problems respecting the disposition of the evacuees. Under present plans, the Army controls the evacuee up to the reception center; at that point the *civilian agencies* of the Federal Government are supposed to assume control."

Ex parte Mitsuye Endo, 323 U. S. 283.

Specification 7. Petitioner submits that this finding is not properly a finding of fact, and, moreover, that it is plainly erroneous whether considered as an ultimate finding of fact or as a conclusion of law.

Conclusion

Petitioner submits that on the record and in view of the history and purpose of the War Relocation Authority, the articles and supplies in question were not military property moving for military use in the sense of the Transportation Act of 1940, but, on the contrary, were shipments of civilian supplies for civilian use.

The conclusion of the Court of Claims, as stated in the majority opinion (R. 65), that "the primary purpose of escorting the evacuees from designated military areas did not end by merely escorting them from those areas and preventing their return" and that, therefore, the shipments in question—although handled by a civilian agency and intended for civilian use—were shipments of military property for military use, is without any support whatever, either in the facts or as a conclusion of law.

It is a conclusion, moreover, in conflict with the decision of this court in *United States* v. *Powell*, No. 56, decided March 3, 1947, where this court held that the Transportation Act of 1940 distinguished "military or naval" use from "civil" use, and must be construed to preserve that distinction.

Respectfully submitted,

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Counsel for Petitioner.